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June 13, 2002

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Room TW-A325
Washington, D.C. 20554

electronically filed

RE: Response to ex parte letter/presentation filed by EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp., ("Applicants") in CS Docket No. 01-348

Dear Ms. Dortch:

I submit this letter on behalf of the American Cable Association ("ACA") to reply briefly to an ex parte letter filed by the Applicants in CS Docket No. 01-348.¹

In the Ex Parte Notice, Applicants contend that the merger should be approved because DBS is at a competitive disadvantage to cable systems. Specifically, the Applicants claim:

¹ Ex Parte Notice, EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp. in CS Docket No. 01-348 (dated May 16, 2002) ("Ex Parte Notice").

- [C]able systems with which DBS providers compete typically already have moved to 50% digital programming, giving them an effective throughput to the home of 2.25 Gbps.²
- EchoStar and DIRECTV are already at a competitive disadvantage to incumbent cable systems.... The merger will help address this competitive disadvantage.³
- [T]he merger will help level the playing field in the MPVD market by allowing DBS to become a more viable competitor to cable incumbents.⁴

When applied to ACA members and the smaller markets they serve, these statements squarely conflict with the record and other data before the Commission. ACA's members include 930 independent cable companies that serve about 7.5 million cable subscribers, primarily in smaller markets and rural areas. Virtually all of these smaller market cable systems have substantially less capacity than that reported by major MSOs. On average, ACA members serve about 8,000 subscribers.

The Applicants' statements overlook the great disparity between the systems and markets of major MSOs and those of ACA members. When the Commission evaluates the Applicants' statements in the context of smaller markets, it will see that the Applicants' smaller market competition is far from 50% digital, and that the Applicants therefore do not need a DBS monopoly to compete with smaller market cable companies. Moreover, DBS already has a competitive advantage over small cable systems, which lose customers to DBS every day. Applicants have provided no credible support for their position that a merged entity with 16 million subscribers is necessary to compete with companies that serve only 8,000 customers.

DBS does not compete with 50% digital cable systems in smaller markets.

The Applicants' "digital advantage" arguments do not apply to small cable. In ACA's Reply Comments in the DTV Must Carry inquiry,⁵ we addressed smaller system capacity data based on responses to a questionnaire distributed to about 280 ACA members serving more than 210,000 customers in about 20 states. The survey showed that about 50% of the systems are below 500 MHz, 75% are

² Ex Parte Notice at 3.

³ Ex Parte Notice at 3.

⁴ Ex Parte Notice at 3.

⁵ See ACA Reply Comments, CS Docket No. 98-120 (filed August 16, 2001).

at or below 550 MHz, and only about 25% are at 750 MHz or above. In contrast, major MSO data showed a nearly reverse distribution of system capacity.⁶

The results of these surveys refute Applicants' claim that cable systems with which DBS providers compete typically already have moved to 50% digital programming. The record clearly shows that the numerous smaller market cable operators do not have the same system size capabilities as the larger MSOs. The Commission must take notice of this market distinction when evaluating the Applicants' statements.

The Applicants do not need a DBS monopoly to compete with smaller market cable companies.

DBS growth in smaller markets shows that the Applicants are at no competitive disadvantage. In fact, just the opposite is true – DBS has substantial advantages over small cable.

First, the average ACA member company serves only 8,000 customers. In contrast, post-merger EchoStar would serve more than 16 million subscribers. Applicants cannot seriously contend that they require a 16 million subscriber DBS monopoly to compete with companies that serve only 8,000 customers.

Second, as ACA explains in detail in its Petition to Deny, the DBS monopoly will have at least three means to weaken and eliminate competition from smaller market cable systems: use of monopoly control over DBS to extract major programming cost concessions; bottleneck control over program distribution; and exploitation of small cable's disparate regulatory burdens.⁷

In short, the record has shown that this merger is about the dominance by DBS of smaller markets and the elimination of competition for millions of subscribers, not about fostering competition and benefiting customers.⁸ As an EchoStar spokesperson has stated outside of these proceedings, a key strategy of this merger is also to eliminate small cable competitors: "We'll start small town by small town...we'll move across the United States leaving cable companies in our wake."⁹

⁶ ACA Reply Comments, CS Docket No. 98-120, at pp. 4-5 (While 75% of the smaller systems are at 550 MHz and below, about 75% of the major MSO systems are at 750 MHz or above. Similarly, about 50% of the smaller systems are at 500 MHz or below, while only 15% of the major MSO systems are projected to be at this capacity by year-end 2001.).

⁷ See ACA Petition to Deny, CS Docket No. 01-348 (filed February 4, 2002).

⁸ See ACA Reply, CS Docket No. 01-348 (filed February 25, 2002).

I am afraid the Ex Parte Notice is another example of the Applicants' attempts to cloud the record with vague generalizations and hyperbole. None of this should distract the Commission from the almost certain effect the satellite monopoly created by this merger would have on small markets: Competition would be eliminated and hundreds of small, local communications businesses could be destroyed. No public interest is served by these results. The Commission should deny the Applications.

With best regards, I remain

Yours sincerely,



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⁹ Monica Hogan, *Dish Cleans Out Small Cable Operator*, Multichannel News (June 5, 2000) <http://www.tvinsite.com/index.asp?layout=story&articleId=CA18710&pubdate=06/05/2000&stt=001&display=searchResults> (quoting EchoStar spokeswoman Judianne Atencio).